No. 10,412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN GENERAL INSURANCE COMPANY (a corporation),

Appellant,

vs.

L. L. BOOZE, FRANK L. VINCENT, an individual, FRANK L. VINCENT, doing business under the firm name and style of Vincent's Dairy,

Appellees.

BRIEF FOR APPELLEE, FRANK L. VINCENT.

PETERS AND PETERS,
304 Broadway, Chico, California.
Attorneys for Appellee, Frank L. Vincent, an individual, Frank L. Vincent, doing business under the firm name and style of Vincent's Dairy.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes and Statutes

No. 10,412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN GENERAL INSURANCE COMPANY (a corporation),

Appellant,

vs.

L. L. BOOZE, FRANK L. VINCENT, an individual, FRANK L. VINCENT, doing business under the firm name and style of Vincent's Dairy,

Appellees.

BRIEF FOR APPELLEE, FRANK L. VINCENT.

JURISDICTIONAL FACTS AND PLEADINGS.

Appellant in its opening brief does not give jurisdictional facts and pleadings other than through statements contained throughout the brief under the different points raised. We do claim that the Circuit Court has no jurisdiction to decide the appeal for the reasons hereinafter stated; also we claim the District Court did not have power nor jurisdiction to try the case, and that its decision dismissing the complaint of plaintiff was in accordance with law.

STATEMENT OF THE CASE.

No statement of the case other than what may be gleaned from the different points made by appellant is contained in appellant's opening brief. Therefore we give a concise statement.

Upon August 22, 1942 plaintiff filed herein its complaint entitling the complaint "Complaint for Declaratory Relief determining the rights of the parties with reference to an indemnification policy". In this statement only the relevant portions of plaintiff's complaint will be referred to. In paragraph IV thereof plaintiff alleges as follows, to-wit:

> "As a part of the insurance business which the plaintiff is authorized to conduct in the State of California is included that of issuing certain agreements known as 'Insurance Policies', for the purpose of indemnifying persons named in said policies, and protecting them under the conditions set out in said policies, from legal liability arising in connection with the maintenance, operation and ownership and driving of motor vehicles. In that connection the plaintiff had issued its policy No. 131186 to the defendant, Frank L. Vincent, as the 'named assured', for the policy year beginning May 22, 1941, and ending May 22, 1942, which policy covered a 1940 Dodge one-ton canopy truck, Motor No. T96-5704, for use in connection with a commercial retail milk delivery business operated by the defendant, Frank L. Vincent, under the name and style of Vincent's Dairy, a photostatic copy of said policy of insurance issued to defendant Frank L. Vincent, together with the amendatory endorsements thereto, is attached to this complaint

and marked Exhibit 'A', and incorporated herein by reference as though fully set forth within this paragraph."

In Paragraph V of said complaint it is substantially averred that the appellee herein, Frank L. Vincent was driving a 1940 Dodge truck described in the policy of insurance issued by plaintiff when such truck was involved in an accident with a Pontiac automobile driven by one Ray White at the intersection of 19th Street and Broadway Street in the City of Chico, County of Butte, State of California. Said paragraph V then avers that at the time of said accident one Vernon Booze, a minor of the age of approximately fourteen years and the son of the defendant L. L. Booze, was riding in a standing position on a step located on the back end of said 1940 Dodge truck which was driven and owned by the defendant Frank L. Vincent at said time, and that as a result of the collision of said Dodge truck driven by said Frank L. Vincent and said Pontiac automobile driven by said Ray White, said Vernon Booze received injuries and died on or about August 3, 1941.

Paragraph VI of said complaint alleges in substance that subsequent to said accident and on or about July 22, 1942 there was filed in the Superior Court of the State of California in and for the County of Butte case No. 18996 entitled "L. L. Booze, plaintiff, versus Frank L. Vincent, an individual, Frank L. Vincent, doing business under the firm name and style of Vincent's Dairy, et al., de-

fendants". That the said Frank L. Vincent referred to in said accident is the Frank L. Vincent included in this case, and that copy of the summons and complaint in said State Court action was served upon the defendant Frank L. Vincent. That in said State Court action it is alleged in the complaint that L. L. Booze was the natural father of Vernon Booze, deceased, who, upon the date of his death was a minor of the age of approximately 14 years and that said minor met his death as a result of the *wilful misconduct* of Frank L. Vincent. Then follows in said complaint filed in the District Court of the United States, Northern District of California, Northern Division, a statement of damages alleged in the State Court action to have been suffered by L. L. Booze, the natural father of the said minor Vernon Booze, deceased.

The complaint filed in the District Court failed to state that also sued in said Superior Court action was one Ray White, the owner and driver of the automobile which had the collision with the Dodge truck driven by Frank L. Vincent. The said Ray White is not made a party in this action, namely the action filed in the said District Court.

The complaint filed in the District Court by plaintiff in paragraph VII alleges in substance that plaintiff notified the said Frank L. Vincent that it would not assume responsibility either for the defense of any lawsuit brought against him because of any claims on behalf of said Vernon Booze or on behalf of the heirs of said Vernon Booze, deceased, resulting

from the above described accident, and alleges it has refused to contribute anything to the settlement of said claim and has refused to assume the defense of the action, said action being Butte County action No. 18996.

The complaint filed in the District Court states in paragraph VIII that an actual controversy exists between plaintiff and defendant relative to whether or not the policy of insurance which plaintiff issued to the said Frank L. Vincent did or does cover any claims made by L. L. Booze or any other party in connection with the injury and death of the minor Vernon Booze, so as to establish responsibility against the plaintiff because of said contract of insurance.

Said paragraph VIII continues and alleges that plaintiff contends that the said Vernon Booze was an employee of the defendant Frank L. Vincent, and acting within the course and scope of his employment and as such employee the sole remedy of the said L. L. Booze for the death of his son is under the provisions of the Workmen's Compensation Act of the State of California, and further that the policy of insurance issued by plaintiff to the defendant Frank L. Vincent does not cover any claims made on account of the injuries and death of said Vernon Booze and that there is no obligation under said policy upon plaintiff to defend the action above described now pending in said Court, that is to say said Butte County action No. 18996, or to pay any judgment that might be rendered in said action. The policy of insurance issued by plaintiff to Frank L.

Vincent is attached to the complaint filed in the District Court as an exhibit and it is admitted to be a true copy of the policy in the case.

Such policy of insurance, which is policy No. 131186 of the plaintiff American General Insurance Company, Houston, Texas, was in force from the 22nd day of May, 1941 to the 22nd day of May, 1942. It is admitted by the pleadings that the policy covers the truck of the defendant Frank L. Vincent mentioned in plaintiff's complaint being a 1940 Dodge one-ton canopy truck, motor No. T96-5705 for use in connection with the commercial retail milk delivery business operated by the said defendant. This policy is quite lengthy and we deem it only necessary to quote parts thereof having a bearing upon this litigation.

Section I, Coverage A in said policy reads as follows, to-wit:

> "To pay on behalf of the Insured (said Frank L. Vincent) all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, *including death at any time resulting therefrom,* sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile" (meaning the automobile or Dodge truck described in the policy). (Emphasis ours.)

Section II, Subdivision 2 of the policy reads as follows, to-wit:

> "(2) Defense, Settlement, Supplementary Payments. It is further agreed that as respects in-

surance afforded by this policy (under Coverages A and B) the Company shall (a) defend in his name and behalf any suit against the Insured alleging such injury or destruction and seeking damages on account thereof, *even if such suit is groundless, false or fraudulent;* but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company; (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the Insured in any such suit, all expenses incurred by the Company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the Insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of the accident. The Company agrees to pay the amounts incurred under divisions (a) and (b) of this section in addition to the applicable limit of liability of this policy."

Under the provisions of said policy the legal limit of liability for "bodily injury liability" are as follows:

"$10,000. each person and subject to that limit for each person.

$20,000. each accident"

In the District Court Frank L. Vincent through his counsel moved to dismiss the action, primarily upon the following ground, to-wit:

> "To dismiss the action because the Court has no jurisdiction of the subject matter of this action inasmuch as the complaint on file herein to which is attached the policy of insurance issued by plaintiff to the defendant Frank L. Vincent discloses that it is merely a policy to pay any judgment that may be rendered against Frank L. Vincent and/or Frank L. Vincent doing business under the firm name and style of Vincent's Dairy, for personal injury caused by the operation of the 1940 Dodge one-ton canopy truck therein mentioned, and that no judgment has been rendered, and therefore no controversy can be had thereover until such judgment be rendered, and therefore the controversy in question does not exceed the sum of Three Thousand Dollars ($3,000.00), and the Court is without the jurisdiction to entertain the same."

Thereafter and upon the 25th day of February, 1943, the Judge of the said District Court granted the motion of the said Frank L. Vincent.

It is from this order of the District Court that appellant appeals.

ARGUMENT.

A. THE PLEADINGS PRESENT NO FACTS WARRANTING DECLARATORY RELIEF.

The opening brief of the appellant has been reviewed and we find no case cited which is applicable

to the instant case. Appellant "begs the question". It assumes, without proof, that the decedent Vernon Booze at the time in question was an employee of the defendant Frank L. Vincent. It argues that said Vernon Booze, being at the time of the accident an employee of the defendant Frank L. Vincent, the remedy of his father is provided exclusively by the Workmen's Compensation Act of the State of California and his father's suit in the Superior Court of the State of California in and for the County of Butte, being said case No. 18996, is entirely without merit and that said local Superior Court has no jurisdiction.

The Superior Court action referred to is one that comes within the purview of the policy. The most appellant's claim amounts to is that it is groundless, false or fraudulent. However, appellant in its policy agrees to defend any suit which came within the purview of the coverage "even if such suit is groundless, false or fraudulent". Also such suit comes within the purview of Section I, Coverage A of said policy and is therefore a suit which, if a recovery is had against the defendant Frank L. Vincent, appellant is obligated to pay up to the limits of its policy.

Appellant in its effort to bring this action within the jurisdiction of the Federal Court, seeks to rely upon the provisions of the Federal Declaratory Relief Act, Section 400 and particularly Paragraph I thereof which reads as follows, to-wit:

> "(1) In cases of actual controversy the courts of the United States shall have the power, upon

> petition, declaration, complaint or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Appellee maintains that there is no controversy within the meaning of such Act, between the appellant and appellee. Appellant sets forth the terms of its policy of insurance, and appellee contends that the Butte County Superior Court action No. 18996 comes within the provisions of its policy to defend and in the event of an adverse judgment, to pay up to the limits of its policy. Appellant by pleading the policy, admits its due execution and delivery. There can be no controversy between appellant and appellee as to the fact that under the terms of this written contract of indemnification, appellant should defend the action and in the event of a judgment pay within the limits of the policy, for both of said parties to this action admit the due execution of the policy and its delivery, and under its terms that is what appellant agreed to do.

It is and has been elementary in the law of contracts not only in the State of California, but in all States of the Union, that an executed written contract is inviolable and the Courts have always respected the sanctity of such a document. In an instance such as this, to permit the appellant or any other insurance company, corporation or person, to

use the Courts as a means of defeating the plain provisions of their written contracts is opposed to public policy. If appellant could prevail in this case, then in other similar cases plaintiffs could prevail, and thus a precedent would be established which would effectively defeat not one but hundreds of thousands of insurance policies similar to this one, which is a standard type. In such cases, to avoid the cost of the defense of an action, and/or in the hope of securing a favorable determination in a federal or other Court, insurance carriers could defeat all such insurance policies and render them useless and void. One taking out an insurance policy such as this, believes that when an accident occurs within the purview of a policy upon which he has paid the premium, that he is entitled to have the action defended, and in the event of an adverse judgment, to have it paid within the limits of the policy. By substituting for such local trial and defense by the insurer, a proceeding such as is here contended for, the insurer could force upon the assured the expense of defending an action such as this, including the expense in the lower Court and also upon appeal, which is the case here, with the hope and aim that it might wear down the assured and also with the hope that it might prevail.

There can be no controversy in this action such as is contemplated by the provisions of the Federal Declaratory Relief Act, for the following reasons, to-wit:

1. There is no controversy over the terms of the policy, which terms explicitly provide that the ap-

pellant will defend the Superior Court action and pay any judgment rendered therein up to the limits of its policy.

2. No judgment has been rendered in the said Superior Court action and therefore there could be no controversy whether or not the appellant has to pay a judgment, and there could be no such controversy until a judgment is rendered.

The only case cited by appellant upon which appellee wishes to comment is that contained in the conclusion of appellant's brief, being the action entitled *Maryland Casualty Company v. Pacific Coal and Oil Company,* 312 U. S. 270.

In that case the petitioner Maryland Casualty Company issued a conventional liability policy to the insured Pacific Coal and Oil Company, and which contained the provision that the insurer would defend any action covered by the policy. While the policy was in force, a collision occurred between an automobile driven by one Orteca and a truck driven by an employee of the insured. Orteca brought an action in an Ohio State Court against the insured to recover damages for injuries sustained in the collision, and prior to its proceeding to judgment petitioner brought the above-named action for declaratory relief and in its complaint alleged that at the time of the collision the employee of the insured was driving a truck sold him by the insured on a conditional sales contract and for that reason that he was not an employee of the insured at such time and hence the company was under no obligation to defend the action brought by Orteca or pay under its policy in the event of an

adverse judgment against the insured. Orteca demurred to the complaint on the ground that it did not state a cause of action against him, and said demurrer was sustained in the District Court and was affirmed in the Circuit Court of Appeals. The Supreme Court granted certiorari to resolve the conflict with other Circuit Courts of Appeal and set forth that the question involved was whether the petitioner's allegations were sufficient to enable it to the declaratory relief prayed for and stated "this raises the question whether there is an 'actual controversy' within the meaning of the Declaratory Judgment Act".

In deciding the question the Supreme Court of the United States reversed both the District Court and the Circuit Court of Appeals and stated as follows:

> "That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy, and secs. 9510-3 and 9510-4 of the Ohio Code (Page's Ohio General Code, Vol. 6, secs. 9510-3, 9510-4) *give Orteca a statutory right to proceed against petitioner by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition.*" (Emphasis ours.)

The *Maryland Casualty Company* case is distinguishable from the instant case. In the instant case there is no statute granting the plaintiff in the Superior Court action the right to proceed against the

appellant herein by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition. Under the law of the State of California if there is a valid policy and the action is one within its provisions, and the insurer fails to pay, it may be sued, but this is in a separate and distinct action, *and is not a supplemental process and action,* such as is granted under the laws of the State of Ohio.

Apparently the Ohio statute gives the plaintiff in personal injury actions a summary right against an insurer of the defendant, whereby in the same action and after the expiration of a certain time, such plaintiff, if successful in securing a judgment, may proceed directly against the insurer. This would be similar to certain statutes in the State of California. If a judgment is rendered against a defendant who claims himself insured under a policy of indemnification when demand is made upon the insurer for the payment of a judgment rendered, an insurer may deny liability; then and then only would an actual controversy arise in respect to the matter. In fact an insurer which deems itself not liable under the terms of the policy has many ways of protection: He may defend under a non-waiver of rights agreement or under a reservation of rights agreement, or may bring a declaratory relief action.

The California law of indemnity contracts is found in Section 2778 of the Civil Code and reads as follows, to-wit:

"Par. 2778. Rules for Interpreting Agreement of Indemnity. In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:

1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable;

2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof;

3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands or liability incurred in good faith, and in the exercise of a reasonable discretion;

4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so;

5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith, is conclusive in his favor against the former;

6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former;

7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he has a good defense upon the merits, which by want of ordinary care he failed to establish in the action. (Enacted 1872.)"

See also

American Building Maintenance Company v. Indemnity Insurance Company, 214 Cal. 608.

It is plain therefore that no actual controversy exists between appellant and appellee Frank L. Vincent for as yet no judgment has been rendered against the appellee Frank L. Vincent; in fact he may win the Superior Court action, and it is our belief he will, but this is merely belief. There can be no controversy over paying a judgment which has not been rendered, and which may in fact never be rendered.

B. THE DISTRICT COURT HAD NO JURISDICTION.

We comprehend the law of Federal Court jurisdiction to be a diversity of citizenship and the controversy involves more than $3000.00 exclusive of interest and costs. There is no controversy here involving more than $3000.00, and cannot be. There is no judgment rendered in the Superior Court action, and as stated hereinbefore in this brief, there can be no controversy over the payment of any judgment until one is rendered. A judgment may never be rendered in said Superior Court action or it may

be entered in a sum less than $3000.00, and hence there is no proof of jurisdiction.

Again there is nothing in the record to show the cost of defending the action will amount to more than $3000.00, or even will approximate such sum. This Court may take notice as a matter of common knowledge, that the cost of the defense of an action such as Butte County Action No. 18996 would not and could not exceed $1000.00. Hence there is no jurisdiction in the District Court.

CONCLUSION.

For the reasons set forth above it is respectfully submitted that the order of the District Court dismissing be affirmed.

Dated, Chico, California,
December 31, 1943.

Respectfully submitted,
PETERS AND PETERS,
Attorneys for Appellee, Frank L. Vincent, an individual, Frank L. Vincent, doing business under the firm name and style of Vincent's Dairy.